

FREQUENTLY ASKED QUESTIONS
of the Department of Environmental Quality
about the
Brownfield Redevelopment Financing Act
1996 PA 381, as amended



www.michigan.gov/deg

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For more information about the Brownfield Redevelopment Financing Act, please go the brownfield redevelopment authority web page available on the DEQ website at www.michigan.gov/brownfieldauthority.

TAX INCREMENT FINANCING & BROWNFIELD PLANS

1. **Q.** How does tax increment financing work under the Brownfield Redevelopment Financing Act, 1996 PA 381, as amended (Act 381)?
A. Cleanup and redevelopment of a brownfield property will increase the taxable value of the property, and therefore, the property taxes generated from the property. The increase in tax revenue over a base year is the tax increment. The increased tax revenues are known as tax increment revenues (TIRs), and more commonly, as captured taxes. These captured taxes can then be used to pay the expenses for eligible environmental response and non-environmental activities. TIRs eligible for capture are all ad valorem property taxes and specific taxes, including taxes levied for school operating purposes with approval from the Department of Environmental Quality (DEQ) or Michigan Economic Growth Authority (MEGA). Taxes already captured as part of an existing tax increment financing plan (under other state laws) and taxes levied to pay off specific obligations are exempt. The taxing jurisdictions continue to receive their base year tax revenue until the brownfield plan ends at which time the TIRs revert to the taxing jurisdictions.
2. **Q.** How long can taxes be captured under a brownfield plan?
A. The maximum duration of capture under a brownfield plan is thirty (30) years.
3. **Q.** What taxes are school taxes?
A. Under Act 381 the local school operating tax and state education tax (SET) are considered school taxes. The intermediate school district tax is not a school tax under Act 381.
4. **Q.** Can debt taxes be captured?
A. No. See the definition of “tax increment revenues” in Section 2(ee) of Act 381.
5. **Q.** Can special assessments be captured?
A. No. Special assessments are not considered a tax and therefore cannot be captured.
6. **Q.** Must a brownfield redevelopment authority (BRA) submit a brownfield plan for DEQ review and approval?
A. No. But, the local unit of government must notify the DEQ not less than 10 days before the hearing on the brownfield plan if the brownfield plan includes the use of school taxes to pay for eligible activities that require the approval of a work plan by the DEQ under section 15(1)(a). For additional information about the notification process, see the Brownfield Plan Notification at http://www.michigan.gov/deq/0,1607,7-135-3311_4110_23246-191981--,00.html.
7. **Q.** What is the DEQ’s role regarding brownfield plans?
A. The approved brownfield plan must accompany the work plan being submitted for DEQ review. DEQ staff will ensure the proposed work plan activities and costs are consistent with the approved brownfield plan. If the brownfield plan is found to be missing elements required by Section 13(1) of Act 381 or contain inaccurate representations, staff will bring such observations to the attention of the BRA. Missing information will be requested as part of the work plan review process.
8. **Q.** Does there need to be a developer to include a property in brownfield plan?
A. No. For marketing purposes it is a good idea to identify eligible properties within the community and include them in the brownfield plan. Also, if funds are available and a BRA wants to ready a property for redevelopment by initiating response activities, the BRA can be reimbursed once a developer is found and the property is redeveloped. If the BRA anticipates using school taxes for

reimbursement, a work plan approved by the DEQ will be necessary before conducting certain eligible activities.

9. **Q.** Does the DEQ review invoices and documentation for cost reimbursement?

A. No, the DEQ is not involved in the reimbursement process at all. This is strictly a local process that should be described in the reimbursement agreement between the developer and the BRA and local unit of government. Adequate records should be maintained for auditing purposes.

10. **Q.** When can a BRA begin depositing captured taxes in the Local Site Remediation Revolving Fund (LSRRF)?

A. The Department of Treasury has indicated that the deposit of **local** taxes into the LSRRF before the brownfield obligation is repaid is permissible provided that there is no net fiscal impact to school tax capture.

ELIGIBLE PROPERTY

11. **Q.** What type of brownfield property is eligible for inclusion in a work plan for DEQ review?

A. The property must be a **facility** as defined by Part 201, Environmental Remediation, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA) **and** is property for which eligible activities are identified under a brownfield plan that was used or is currently used for commercial, industrial, public, or residential purposes, including personal property located on the property, to the extent included in the brownfield plan and includes parcels that are adjacent or contiguous to that property if the development of those parcels is estimated to increase the captured taxable value of that property.

A complete definition of eligible property can be found in Section 2(n) of Act 381 at:

[http://www.legislature.mi.gov/\(S\(dgdxog55wekinm55wdxnpa2c\)\)/mileg.aspx?page=getObject&objectName=mcl-125-2652](http://www.legislature.mi.gov/(S(dgdxog55wekinm55wdxnpa2c))/mileg.aspx?page=getObject&objectName=mcl-125-2652).

12. **Q.** Does the property need to be a facility **prior** to submission of a work plan to the DEQ?

A. Yes. However, parcels adjacent or contiguous to the facility property do not have to be a facility for eligible activities to be conducted on them if the development of those parcels is estimated to increase the captured taxable value of the facility property.

13. **Q.** Is a former school an eligible property?

A. Yes, because it was used for a public purpose. It must also meet other eligibility criteria including being a facility for the purpose of conducting response activities and DEQ work plan review.

14. **Q.** If the current owner/operator of a facility wants to expand their business on the property; can the property be included in a brownfield plan?

A. Yes, if the property owner is not liable under Part 201 of the NREPA and has conducted a baseline environmental assessment the property can be included in a brownfield plan and captured taxes, including school taxes, can be used for reimbursement of eligible response activities.

ELIGIBLE ACTIVITIES

15. **Q.** What activities are eligible and potentially approvable components of a DEQ Act 381 work plan?

A. As defined, “eligible activities” or “eligible activity” means one or more of the following for the purposes of a DEQ work plan:

- Baseline environmental assessment (BEA) activities
- Due care activities
- Additional response activities
- Reasonable cost of environmental insurance

Some examples of eligible response activities, by category, include:

BEAs

- Environmental assessments subsequent to determining the property is a facility.
- Sampling and analysis.
- Data interpretation and reporting.
- Development and installation of engineering controls or isolation zones.
- Disclosure of BEA.
- Petitioning for DEQ determination.

Compliance with Due Care (7a) Obligations

- Investigation (sampling, analysis, interpretation, reporting) to define contamination.
- Assessment of intended use with regard to contamination on site to identify 7a issues.
- Development of a plan for response activities to meet 7a obligations.
- Contaminant treatment or removal to prevent unacceptable exposure or exacerbation.
- Barriers to prevent exposure, exacerbation, or third party impacts.

Additional Response Activities

- Evaluation.
- Interim response activity.
- Remedial action.
- Demolition that is a response activity.
- Lead or asbestos survey and sampling.
- Lead or asbestos abatement that is a response activity.
- Taking of other actions necessary to protect the public health, safety, welfare, environment, or natural resources including those that are more protective than that required to comply with due care.

16. **Q.** How much detail is needed in the work plan for the proposed activities?

A. The activities should be placed into the appropriate activity category. Adequate detail should be provided to demonstrate that the activities are eligible and necessary. Describe how the due care and additional response activities will be protective of the public health, safety, and welfare and the environment, i.e. how due care compliance will be achieved. All available analytical data should be provided. An estimate of anything that can be quantified is always helpful for evaluating eligibility and whether costs are reasonable. See Q/A #31. below regarding the kinds of information needed for proposed additional response activities that are more protective than that required to comply with due care.

17. **Q.** Can the work plan budget contain a line item for contingencies?
- A.** Yes. The DEQ may approve up to fifteen (15) percent of the approved activity costs for contingencies. Contingency funding cannot be used for activities that are denied by the DEQ.
18. **Q.** What if the project has received state grants such as Site Reclamation, Brownfield Redevelopment, or Waterfront Redevelopment?
- A.** Captured taxes cannot be used for any eligible activities that are being funded by a state grant. School taxes can be used to pay back a loan such as a DEQ Brownfield Redevelopment Loan or Revitalization Revolving Loan provided this would not benefit a liable party and the activities have not been conducted. Captured taxes can be used to reimburse an U.S. EPA brownfield revolving loan fund.
19. **Q.** Is the excavation and off-site disposal of contaminated soil or fill material an eligible activity?
- A.** Yes, if the contaminant levels exceed criteria that would adequately protect public health for the intended redevelopment; if it is demonstrated through the submission of a competent engineering analysis that the fill material is unable to provide adequate structural support; or if it is demonstrated the contaminated soil or fill material cannot physically be accommodated on site by use of tools available under Part 201 of the NREPA. Building relocation and alternate construction methods should also be evaluated to determine the most cost-effective method for addressing the contamination. If excavation is necessary as part of the construction project (i.e. a basement is being constructed), school taxes will only be approved for the additional costs due to the presence of contamination (i.e. the cost of excavating the basement would be ineligible but the increase in off-site disposal costs due to the contamination would be eligible). This may include additional handling, disposal, and backfill costs.
20. **Q.** Is the excavation and off-site disposal of uncontaminated waste fill material (i.e. brick, concrete, wood, metal, glass, etc.) an eligible activity?
- A.** Yes, if the fill material is waste, not soil, and it is demonstrated through the submission of a competent engineering analysis that the waste fill material is unable to provide adequate structural support for the building. Building relocation and alternate construction methods should also be evaluated to determine the most cost-effective method for dealing with the waste fill material. See Q/A #19. above with regard to limitations on excavation and disposal.
21. **Q.** Is the removal and off-site disposal of surface debris/solid waste or physical hazards an eligible activity?
- A.** Generally this would not be considered a response activity except demolition debris when qualified as a response activity, as contaminated wastes, or for structural support issues.
22. **Q.** Is protection of surface water an eligible activity?
- A.** Generally, protecting surface water from existing contamination would be an "additional response activity". In some instances surface water protection activities may be required under due care to prevent exacerbation. See Q/A #31. below regarding the kinds of information needed for proposed additional response activities that are more protective than that required to comply with due care.
23. **Q.** Is the cost to place cover (a barrier) over contamination an eligible activity?
- A.** It depends. The DEQ will generally approve the cost of four inches of topsoil, grass seed, and mulch in low activity (landscaped) areas of the property where contaminant concentrations exceed the human direct contact criteria. The DEQ will allow for more cover in active areas such as playgrounds, high foot-traffic, etc. The amount approved will be site-specific depending on the proposed development. The DEQ will not approve the cost of roads, parking lots, basement floors, etc., as necessary human direct contact barriers.

24. **Q.** Are administrative and operating expenses of the BRA or the municipality on behalf of the BRA considered eligible activities?
- A.** Yes, but from **local** taxes only and not to exceed \$300,000 per BRA per fiscal year depending on the number of active projects (See Section 13(19) of Act 381). BRA administrative costs should not be included in a work plan submitted to the DEQ.
25. **Q.** Are meetings and negotiations costs of a BRA's environmental consultant considered eligible activities?
- A.** Yes, if necessary and reasonable for the planning or implementation of eligible activities.
26. **Q.** Are the costs of preparing a brownfield plan, work plan or the costs of work plan review by the DEQ considered eligible activities?
- A.** Yes, the reasonable costs of preparing a brownfield plan and work plan and the actual cost of the DEQ's review are eligible expenses and can be reimbursed with school taxes.
27. **Q.** Are lead and asbestos abatement eligible activities?
- A.** Yes, lead and asbestos abatement qualify as eligible activities for either DEQ or MEGA approval based on the following:
- DEQ** – The eligible property is a facility and lead or asbestos abatement is necessary as a response activity (i.e. lead paint or asbestos material is in poor condition and there has been a release of lead or asbestos to the environment).
- MEGA** – The eligible property is a facility, blighted or functionally obsolete and the lead or asbestos abatement is not a response activity, but is necessary for redevelopment activities to occur.
28. **Q.** Is demolition an eligible activity?
- A.** Yes, demolition qualifies as an eligible activity for either DEQ or MEGA approval based on the following:
- DEQ** – The eligible property is a facility and demolition is necessary as a response activity (i.e. demolition is necessary to address the contamination, the building is contaminated, or the structure has been condemned and formally declared dangerous).
- MEGA** – The eligible property is a facility, blighted or functionally obsolete and the demolition is not a response activity, but is necessary for redevelopment activities to occur.

WORK PLANS

29. **Q.** When is DEQ approval of a work plan required?
- A.** When school taxes will be used to pay for certain environmental response activities such as implementation of activities to satisfy due care obligations (i.e. soil remediation or installation of a barrier to prevent unacceptable exposure) and all additional response activities. In addition, if school taxes will be used to reimburse interest costs associated with financing of any response activities, those activities must be approved in a work plan.
30. **Q.** What activities can be conducted **without** DEQ work plan approval and still be reimbursed with school taxes?
- A.** Site investigations required to conduct a BEA or evaluate due care obligations (i.e. Phase I & II

environmental site assessments), complete a BEA report, and prepare a due care plan. *Be aware that with this approach there is some risk there will not be adequate site information for the DEQ to approve a work plan to implement activities to achieve due care compliance or beyond. Also, if school taxes will be used to reimburse interest costs associated with these activities, they need to be included in a work plan approved by the DEQ.* These activities can be included in a work plan for DEQ review any time BRA desires.

31. **Q.** How does the DEQ process requests for Act 381 work plan approval?

A. DEQ staff will review the work plan for administrative completeness and then determine the following:

- ✓ Whether some or all of the activities are due care activities or additional response activities.
- ✓ Whether the due care activities and additional response activities are protective of the public health, safety, and welfare and the environment.
- ✓ Whether the estimated costs for the activities as a whole are reasonable.

The DEQ may approve additional response activities that are more protective than that required to comply with due care if the activities provide public health or environmental benefit (i.e. cleaning up commercial property to residential criteria). In review of a work plan that includes activities that are more protective, the DEQ's considerations may include, but are not limited to, all of the following:

- Proposed new land use and reliability of restrictions to prevent exposure to contamination.
- Cost of implementing activities minimally necessary to achieve due care compliance, the incremental cost of all additional response activities relative to the cost of all response activities, and the total cost of all response activities.
- Long-term obligations associated with leaving contamination in place and the value of reducing or eliminating these obligations.

The DEQ staff must prepare a written response indicating one of the following determinations:

- ❖ An unconditional approval.
- ❖ A conditional approval that delineates specific necessary modifications to the work plan including, but not limited to, individual activities to be added or deleted from the work plan and revision of costs.
- ❖ If the work plan lacks sufficient information or requires changes the DEQ will issue a letter stating the necessary additions or changes to the work plan before that activity will be considered by the DEQ.
- ❖ A denial if the property is not an eligible property, if the work plan proposes the use of school taxes that benefit a liable party, or for any activity conducted before approval of the brownfield plan. The DEQ will state the reason for the denial. If the DEQ denies all or a portion of a work plan, the BRA may resubmit the work plan.

Response letters will be issued under signature of the DEQ/RRD District Supervisor.

32. **Q.** Does DEQ approval of a work plan for BEA or due care activities provide a guarantee that the agency will find the resultant BEA or due care plan adequate in the event a petition is received for a determination in the future?

A. No. However, the DEQ's approval of the work plan indicates the proposed course of action to develop a BEA or meet due care obligations is generally appropriate and, based on available information, is likely to be sufficient. The manner in which the activities are implemented, new site-specific findings, evolution of redevelopment plans, etc., will impact the ultimate adequacy of the BEA and due care activities.

33. **Q.** How are reasonable costs determined?
- A.** The DEQ will base its determinations on comparison with similar activities at private, state-funded, and/or other brownfield redevelopment sites in the district or state. If costs for the activities as a whole are determined to be unreasonable, the BRA may be requested to provide additional information or justification for those costs.
34. **Q.** What if the actual costs of the eligible activities will exceed the approved work plan costs?
- A.** If the actual costs will exceed the approved work plan costs (including the 15 percent contingency, if appropriate), approval from the DEQ will be necessary before the work is conducted and approved costs are exceeded.
35. **Q.** Is a work plan required for additional response activities?
- A.** Yes, if a BRA wants to use school taxes to pay for the additional response activities. No, if school taxes will not be used.
36. **Q.** Can draft works plan be submitted for DEQ review?
- A.** Yes. The BRA must reimburse the DEQ for all work plan reviews including drafts.
37. **Q.** How much does it cost for DEQ review of a work plan?
- A.** The average cost is about \$1,000 per work plan. The BRA will be billed for all work plan reviews regardless of whether the work plan was approved or implemented or the redevelopment occurred. The BRA may be invoiced before any tax capture has occurred on the property so this should be planned for as part of the reimbursement agreement. Also, if the BRA is in arrears with work plan review payments, the DEQ may withhold future work plan reviews until all invoices are paid.
38. **Q.** Can works plan be submitted electronically?
- A.** No. The agencies are required to maintain paper copies in their files. Due to state budgetary constraints and limitations on printing, the agencies cannot print these large documents, maps, photos, etc. In addition, the document size generally strains the capacity of the electronic mailboxes of agency staff.
39. **Q.** Where should a BRA submit a work plan for conducting response activities pursuant to Act 381?
- A.** The work plan and approved brownfield plan must be submitted in an **unbound and two-sided** format to the DEQ Remediation and Redevelopment (RRD) District Supervisor in the district office serving the BRA's county. A copy must also be sent to Darlene Van Dale, Act 381 Coordinator, in the Gaylord Field Office. See DEQ/RRD Office Locations map at www.michigan.gov/brownfieldauthority. The official receipt date is the date the work plan is received in the DEQ district office.
40. **Q.** What if the project includes eligible activities requiring both DEQ and MEGA approval?
- A.** Preparation of one work plan is recommended and must be submitted to the DEQ and to the MEDC. The proposed activities and associated costs should be separated within the work plan so that both agencies know which activities and costs they are being requested to review. The brownfield plan should include separate tax increment financing tables identifying tax capture for the DEQ costs and for the MEGA costs.
41. **Q.** How long will it take to the DEQ to complete the work plan review?
- A.** Up to sixty (60) days. If the work plan is insufficient and additional information or changes are requested by the DEQ, another forty-five (45) days are provided for review of the additional information.

42. **Q.** Is DEQ approval necessary to use funds from the Local Site Remediation Revolving Fund (LSRRF)?
- A.** Yes, if school taxes placed in the LSRRF will be used for eligible activities requiring DEQ approval.
43. **Q.** Is DEQ approval necessary for the interest costs associated with financing of the eligible activities?
- A.** No. If the BEA, due care, and additional response activities and interest are included in a work plan approved by the DEQ, the BRA may capture taxes levied for school operating purposes and local taxes for the payment of that interest. Although DEQ approval of the interest is not required, the DEQ will confirm the interest rate is reasonable.

STORAGE TANKS

44. **Q.** Is the removal of underground storage tanks (USTs) and product from the USTs an eligible activity?
- A.** Generally not. The owner is responsible for emptying and removal/closure of USTs regulated under Part 211, Underground Storage Tank Regulations, of the NREPA. The DEQ may consider approval of the use of school taxes for regulated UST removal under the following circumstances:
- a. The property is owned by the local unit of government or the state who acquired it involuntarily through tax-reversion.
 - b. The property is owned by the local unit of government who acquired it voluntarily through eminent domain or for a nominal fee (i.e. a dollar).
 - c. The USTs were previously unknown (i.e. they were discovered subsequent to performing adequate pre-purchase due diligence).

If the UST is not regulated under Section 21101(i) of the NREPA, (i.e. farm or residential tank of 1,100 gallons or less for storing motor fuel for noncommercial purposes, heating oil tank used for consumptive use on the premises, etc.), removal of the product and tank may be an eligible activity if necessary to meet due care obligations.

45. **Q.** Is the cleanup of released product and/or contaminated resources from USTs an eligible activity?
- A.** These costs may be eligible to meet due care obligations or as an additional response activity if related to a release at an eligible property.
46. **Q.** Is the installation of an UST system considered an eligible activity?
- A.** Only the incremental costs for elements of the system that are necessary to accomplish a BEA meet due care obligations, or accomplish an additional response activity. For example, that increment of the UST system installation costs to provide an “engineered control” (i.e. costs to provide a double wall or other means of establishing a leak detection zone) means of distinguishing new releases from existing contamination for a category “S” BEA could be eligible.
47. **Q.** Is the removal of aboveground storage tanks (ASTs) and product from the ASTs considered an eligible activity?
- A.** Emptying/purging of ASTs regulated under The Michigan Fire Prevention Code, 1941 PA 207, as amended, and subsequent Executive Reorganization Orders 1997-2 and 1998-2, and the Flammable and Combustible Liquid Rules are not eligible activities. This is the responsibility of the property owner. Removal of the AST and addressing any resulting contamination may be eligible as due care or additional response activities.

LIABILITY AND ACT 381

48. **Q.** Can school taxes be used for response activities where the developer is a party liable under Section 20126 of the NREPA for contamination on the property?
- A.** Section 15(1)(e) of Act 381 prohibits a BRA from using captured school taxes for response activities that benefit a Section 20126 liable party with the exception of response activities associated with a landfill. Under Act 381, it is considered a benefitting a liable party only if the developer or person seeking reimbursement for eligible activities on the eligible property is liable under Section 20126. BRAs are responsible for inquiry into the status of liable parties for eligible properties, including previous owners and operators, and ensuring that work plans submitted for DEQ approval do not propose such activities. Section 15(1)(e) does not preclude the BRA from using captured local taxes for such a project.
49. **Q.** Can school taxes be used for response activities where the developer is a limited liability company (LLC) with a member who has liability under Section 20126 of the NREPA for contamination on the property?
- A.** No. Section 15(1)(e) of Act 381 prohibits a BRA from using captured school taxes for response activities that benefit a party who has liability under Section 20126. If the developer or person seeking reimbursement is an LLC with a member who is liable, school taxes cannot be used based on the direct and/or indirect benefit that the liable party would receive.
50. **Q.** Can captured school taxes be used for response activities where the property owner/operator or developer has liability under the Resource Conservation and Recovery Act of 1976 (RCRA) for contamination on the property?
- A.** Yes. The limitations of Section 15(1)(e) of Act 381 regarding the use of school taxes for activities that benefit a liable party is limited to liability under Part 201 of the NREPA.
51. **Q.** Prior to implementing response activities with captured local taxes; must a BRA notify a liable party and provide them with the opportunity to perform the response activities?
- A.** No.

AGENCY CONTACTS

52. **Q.** Who is the general contact regarding tax increment financing under Act 381?
- A.** The Michigan Department of Treasury, Bureau of Local Government Services, Local Audit and Finance Division, Lansing, MI, 517-373-3227.
53. **Q.** Who can assist with establishment of a BRA and preparation/adoption of a brownfield plan?
- A.** Agency Contacts: Department of Environmental Quality (DEQ)
Remediation and Redevelopment Division (RRD)
Ron Smedley, 517-373-4805, smedleyr@michigan.gov
or
Darlene Van Dale, 989-705-3453, vandaled@michigan.gov
and
Michigan Economic Development Corporation
Peter Anastor, 517-373-9014, anastorp1@michigan.org
and
Community Assistance Team
Katharine Czarnecki, 517-241-4950, czarneckik@michigan.org

54. **Q.** Who is the contact for interpretation of eligible activities that include baseline environmental assessments, due care activities, or additional response activities and information regarding preparation and submission of work plans for DEQ review?
- A.** General Contact: Darlene Van Dale, 989-705-3453, vandaled@michigan.gov
Site Specific Contact: DEQ/RRD staff in the district office serving your county
(See DEQ/RRD Office Locations map at www.michigan.gov/brownfieldauthority).
55. **Q.** Who is the contact for interpretation of eligible activities that include site preparation, demolition, infrastructure improvements, and lead or asbestos abatement and information regarding preparation and submission of work plans for Michigan Economic Growth Authority (MEGA) review?
- A.** The Michigan Economic Development Corporation (MEDC) administers the program for MEGA. Contacts at the MEDC are Peter Anastor, 517-373-9014, anastorp1@michigan.org and Sarah Rainero, 517-241-4801, raineros@michigan.org.
56. **Q.** Who developed and is responsible for updating the qualified local governmental units (core communities) list?
- A.** Department of Treasury, State Tax Commission, Lansing, MI, 517-373-3200.
57. **Q.** Who is the contact for the Michigan Business Tax brownfield redevelopment credit?
- MEDC, Peter Anastor, 517-373-9014, anastorp1@michigan.org and Sarah Latta Rainero, 517-241-4801, raineros@michigan.org.
58. **Q.** Who is the contact for the DEQ brownfield grants and loans program?
- A.** Susan Erickson, 517-241-8707, ericksons@michigan.gov. For information about the program, go to www.michigan.gov/deqbrownfields and select Brownfield Grants and Loans.